

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## **Advice Memorandum**

DATE: April 29, 1997

TO : Rochelle Kentov, Regional Director  
Region 12

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Lakeland Regional Medical Center, Inc. 512-5012-8300  
Case 12-CA-18460 512-5012-8301  
512-5012-8320  
512-5072-3900

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by discriminatorily denying the Union access to solicit authorization cards and distribute Union literature on its property.

### FACTS

Lakeland Regional Medical Center, Inc. (the Employer) is a private, non-profit, acute care hospital. The Employer leases the buildings and grounds from the City of Lakeland (the City), pursuant to a lease and transfer agreement that was executed in 1986. Lakeland Regional Health Systems, Inc.<sup>1</sup> contracted in 1988 to purchase the parking lots contained within the demised property owned by the City.

On the morning of October 10, 1996 a United Food & Commercial Workers Union Local 1625 (the Union) non-employee organizer visited Lakeland City Hall to ask the City Attorney whether Park Trammel Boulevard, which traverses the property leased by the City to the Employer, was private property. The City Attorney told the Union that he would check and get back in touch with the Union. The Union non-employee organizer then asked the Police Department's attorney and a lieutenant in the Police

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<sup>1</sup> According to the Employer, Lakeland Regional Health Systems, Inc. is the same entity as Lakeland Regional Medical Center, Inc., with the former owning parking facilities and the latter leasing the hospital and other appurtenances.

Department this same question. The lieutenant stated he believed that Park Trammel was a city street. Thereafter, the Union notified the lieutenant of when and where the Union intended to leaflet.

At approximately 2 p.m., on October 10, 1996 the Union stationed nine non-employee organizers at several locations along Park Trammel Boulevard. The organizers attempted to solicit authorization cards and distribute union literature to employees as the employees entered and exited the hospital during shift change. At about 3 p.m., the Employer approached several Union organizers and photographed or appeared to photograph one or more employees as the organizers solicited them. At about this time, security guards also stood in close proximity to the Union organizers and watched them for several minutes. The Union continued to leaflet as planned until the shift change was completed.

At about 4:30 p.m., the City Attorney phoned the Employer, and stated that, based upon his research of the relevant records, Park Trammel was not a public street or right-of-way, and was therefore part of the property leased to the Employer. When the Union organizers returned for the next shift change, at about 6:00 p.m., they took up the same positions along Park Trammel that they had occupied during the first leafleting. The Employer immediately informed them that Park Trammel was private property and that it would have them removed for trespassing unless they took up positions on the perimeter streets running parallel to each other, Lakeland Hills Avenue and U.S. Route 98, which are public streets.

During the course of the following three days, Union organizers leafleted from positions in or near the intersections of Park Trammel with the perimeter streets, Lakeland Hills Avenue and U.S. Route 98. The police on several occasions issued trespass warnings to several organizers for allegedly standing on Park Trammel. On November 7 and November 13, the Union again leafleted as set forth above. The police issued trespass warnings to the Union at these times.

On November 20, 1996, the Union filed suit in federal district court for the Middle District of Florida. The Union brought the action against the City and the Police,

alleging violations of 42 U.S.C. Sec. 1983.<sup>2</sup> The Union claimed that the City and Police had deprived the Union and its members and supporters of their constitutional rights of speech, association and assembly by arresting, threatening and harassing them as they tried to leaflet along Park Trammel. The Union sought a temporary restraining order (TRO) preventing further interference with their leafleting along Park Trammel, as well as permanent injunctive relief and monetary damages.

On January 13, 1997, Judge Merryday of the Middle District of Florida, Tampa Division, denied the Union's motion for a TRO. He reasoned, *inter alia*, that "[s]ignificant evidence indicates that [Park Trammel] Boulevard is private, not public property."

The Employer's no-solicitation, no-distribution policy states, in relevant part:

Solicitation or distribution of literature of any kind by non-employees is prohibited at all times on Hospital property." Regarding charitable solicitations, the policy states: "The only solicitation for charitable or philanthropic purposes approved by the hospital is for the annual Untied Way campaign, periodic blood drives, and for the Lakeland Regional Medical Center Foundation.

The Employer permitted the following organizations access to its property: (1) political candidates distributed campaign literature on Park Trammel on numerous occasions; (2) a blood bank was granted access during holiday seasons and Doctors' Weeks; (3) a drug prevention resource center solicited contributions and distributed buttons October 19-26, 1996; (4) pharmaceutical companies distributed drug samples, pens, writing pads, coffee mugs, and post-it's on several occasions; (5) medical text publishers were granted access to a book fair during Nurse's Week in May of 1996; (6) Merrill Lynch and Valic were permitted access one day a week; (7) the hospital auxiliary sold jewelry and shoes one day every year and donated the proceeds to the Employer; (8) GTE Mobilnet was granted access during the summer months of 1996; (9) AT&T

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<sup>2</sup> Subsequently, the Employer was granted leave to intervene as a defendant.

Wireless was permitted access one day a week; (10) Good Shepherd Hospice distributed literature one week during National Hospice month; and (11) the public was granted use of parking lots during local public high school football games.

ACTION

We conclude that the Employer's denial of access to the Union unlawfully discriminated against Union activity.

An employer's right to exclude nonemployee organizers from property to which it holds title is controlled by Lechmere.<sup>3</sup> The burden is on the employer who excludes nonemployee organizers from property to show the property right it possesses; the employer must show some cognizable property interest with a requisite degree of control over that interest.<sup>4</sup> Further, a property owner may exclude activities from his property through a non-discriminatory no-solicitation policy,<sup>5</sup> but may not exclude union solicitation of customers via informational picketing and handbilling while permitting civic and charitable solicitation.<sup>6</sup>

In the instant case, the Employer has the requisite property interest to trigger the application of Lechmere. In this regard, on January 13, 1997 the federal district

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<sup>3</sup> Lechmere, Inc. v. NLRB, 502 U.S. 527, 139 LRRM 2225 (January 27, 1992).

<sup>4</sup> In Giant Food Stores, Inc., 295 NLRB 330, 332 n. 8 (1989), the Board held that the company failed to meet that burden where it had not submitted into evidence a document referred to in the lease as "Exhibit A," and which listed all areas where the company had an exclusive use. See also Furr's Cafeterias, Inc., 292 NLRB 749 (1989).

<sup>5</sup> Loehmann's Plaza, 316 NLRB 109 (1995).

<sup>6</sup> Riesbeck Food Markets, Inc., 315 NLRB 940, 941 (1994), and cases cited therein, St. Vincent's Hospital, 265 NLRB 38, 40 (1982), enfd. in pertinent part 729 F.2d 730 (11th Cir. 1984).

court for the Middle District of Florida determined that "[s]ignificant evidence indicates that [Park Trammel] Boulevard is private, not public property." Further, on October 10, 1996 the City Attorney indicated to the Employer that he had concluded, based upon his research of relevant records, that Park Trammel was not a public street or right-of-way. The City Attorney's conclusion was based in part upon an October 31, 1995 memorandum in which the public works assistant-director wrote, to the community development director, that "Park Trammel is not a publicly-dedicated street either by deed, plat or other conveyance, but a private internal access road that serves the Lakeland Regional Medical Center property." Finally, we note that in 1957, the City passed Resolution 297 making the eastern 585 feet of Park Trammel closed as a public way.

However, we conclude that the Employer discriminatorily denied the Union access. Where an employer discriminatorily posts its property against nonemployee union solicitation, "a 'disparate treatment' analysis that focuses on the Respondent's discriminatory conduct, rather than [an] 'accommodation' analysis" is appropriate.<sup>7</sup> For example, in D'Alessandro's, Inc.,<sup>8</sup> the employer had allowed two political candidates to hold a press conference, handbilling, sales, and displays of boats and other vehicles on its premises. Since there was no evidence that the employer had a policy of barring access to its premises to outside individuals or organizations, but rather singled out union activity for exclusion, the Board found unlawful such content-based discrimination.

In Salter Packard Children's Hospital,<sup>9</sup> the Board again held that an employer violated Section 8(a)(1) by

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<sup>7</sup> D'Alessandro's, Inc., 292 NLRB 81, 83-84 (1988). See also Ordman's Park and Shop, 292 NLRB 953, 956 (1989) (use of public areas by civic organizations, churches and individuals for broad range of activities, while union denied use of same premises).

<sup>8</sup> D'Alessandro's, supra at 84.

<sup>9</sup> Lucile Salter Packard Children's Hospital, 318 NLRB 433, 434 (1995).

discriminatorily precluding union organizational solicitation while sanctioning other solicitation. There, the employer was engaged in the operation of an acute care pediatric hospital, and had an established practice of permitting nonemployees to solicit and sell goods and services at tables or booths in a hallway adjacent to its cafeteria. On a regular basis, the employer permitted a casualty property insurance company, a flower vendor, two jewelry vendors and a clothing vendor, to solicit and distribute materials. However, when the union commenced an organizing campaign on the employer's property, the employer refused to permit the union to do so. The Board held that the presence of commercial vendors offering products and services that are not part of an employer's employees' regular benefit package or an employer's necessary functions, when union solicitation is precluded, constituted evidence of disparate treatment.<sup>10</sup>

Moreover, the Board in Salter Packard Children's Hospital, distinguished that case from Rochester General Hospital <sup>11</sup> and George Washington University Hospital.<sup>12</sup> The employers in those cases permitted organizations to solicit sales of products that were an integral part of the employers' health care functions and responsibilities. In Rochester General Hospital, displays of posters and blood collection by the Red Cross for the hospital blood bank, sales by a volunteer group that donated proceeds to the hospital, and displays of pharmaceutical products and medical books were work-related activities that assisted the hospital in carrying out its community health care functions, and not evidence of disparate treatment. <sup>13</sup> Similarly, in George Washington University Hospital, sales by the Women's Board <sup>14</sup> that were donated to the hospital,

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<sup>10</sup> Id. at 433.

<sup>11</sup> Rochester General Hospital, 234 NLRB 253 (1978).

<sup>12</sup> George Washington University Hospital, 227 NLRB 1362, 1374 fn. 39 (1977).

<sup>13</sup> Rochester General Hospital, supra at 259.

and sales by the psychiatry department of "white elephants", as a form of therapy for its patients, were an integral part of the hospital's necessary functions.<sup>15</sup> By contrast, in Salter Packard Children's Hospital, various commercial organizations solicited sales of products such as insurance other than health care and jewelry that were neither related to the hospital's health care function or part of the employees' regular benefit package.<sup>16</sup>

In the instant case, it is clear that the Employer discriminatorily prohibited Union activity on its property. The Union was precluded from soliciting authorization cards and distributing Union literature on October 10-13, 1996 and November 7 and 13, 1996. However, as in D'Allesandro's, *supra*, and Salter Packard Children's Hospital, *supra*, while the Employer was denying the Union access to its facility, it allowed nonemployee commercial organizations and political candidates to solicit and distribute materials. In this regard, we note that the Employer permitted GTE Mobilnet, AT&T Wireless, a local judge and other political candidates to solicit on a frequent basis. The fact that the Employer asserts that it hasn't allowed political candidates on its property since it became aware that Park Trammel is private property does not lead to a different result since the Employer had permitted politicians on the property shortly before denying the Union access.<sup>17</sup> Further, the Employer allowed

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<sup>14</sup> The Women's Board consisted mostly of the wives of university professors and physicians.

<sup>15</sup> George Washington University Hospital, *supra* at 1374 fn. 39.

<sup>16</sup> Salter Packard Children's Hospital, *supra* at 433-434, relying on D'Alessandro's Inc., 292 NLRB 81 (1988).

<sup>17</sup> Also, the Employer indicates that no one except the Union has asked to solicit/distribute literature on its property along Park Trammel since the City Attorney's October 10 call indicating that the street was part of the Employer's leased property. The Employer has not put anything in writing to indicate that solicitation/distribution will not be allowed on Park Trammel in the future.

the public use of its parking lots during local public school football games.<sup>18</sup> It is clear that political campaigns and parking for football games are activities that are neither related to the Employer's health care function nor part of the employees' regular benefit package. We would further argue that allowing access to AT&T and GTE is also evidence of discriminatory access. Although the Employer allegedly contracted with these companies to provide a benefit to its employees, cheaper activation fees for cellular phones, this benefit does not appear to be part of the Employer's regular benefit package (as opposed to Merrill Lynch and Valic's presence pursuant to the Employer's 401 (k) and annuities benefits provided to employees). Further, cellular phones are not integral to the Employer's regular functions, since employees are not required to have cellular phones.

Further, the access allowed by outside groups does not fall within the "beneficent acts" exception to a no-solicitation rule.<sup>19</sup> In Serv-Air Inc.,<sup>20</sup> the Board held that "collections for the family of a deceased employee, ... collection for the hospitalized wife of an employee, and on one occasion permitt[ing] the Community Chest to solicit payroll deductions from several employees"<sup>21</sup> merely constituted "beneficent acts" falling "far short of

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<sup>18</sup> The fact that the City's contract for sale and purchase of the parking lots from the Employer requires that the Employer permit this use of its property does not render this use any less a disparate treatment. It is enough that this disparate treatment occurs. The reason why it occurs does not change that fact.

<sup>19</sup> Be-Lo Stores, 318 NLRB 1, 10-11, citing Serv-Air, Inc., 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); Emerson Electric Co., U.S. Electrical Motors Division, 187 NLRB 294 (1970).

<sup>20</sup> 175 NLRB 801 (1969).

<sup>21</sup> Id.

establishing forbidden discrimination."<sup>22</sup> However, the Board noted that the further accumulation of such "beneficent acts" might constitute disparate treatment.<sup>23</sup> Thus, the Board will evaluate the "quantum of...incidents" involved to determine whether unlawful discrimination has occurred.<sup>24</sup>

Then, in Be-Lo Stores,<sup>25</sup> the Board evaluated the "quantum of...incidents" and found solicitation by non-union groups on the employer's property significant enough to warrant a finding that the employer disparately enforced its no-solicitation rule.<sup>26</sup> There, the employer permitted non-union groups and individuals to solicit in and around its stores, despite its corporate-wide "no-solicitation" policy: Muslims sold oils and incense on a "pretty constant" basis; an "occasional" Jehovah's Witnesses distributed the Watchtower magazine; on one occasion a local Lions Club solicited; Lyndon LaRouche followers handed out literature on a "couple of occasions"; a person sold a cookbook inside its Store 102; and "occasional[ly]" individuals sold Girl Scout cookies and greeting cards inside Store 232.<sup>27</sup>

In the instant case, the groups which the Employer allowed are not charitable or religious organizations. Further, the "quantum of incidents" are too frequent to fall within that narrow exception. And, the Employer's no solicitation policy's exception for charitable organizations only includes the United Way, blood drives and the Lakeland Regional Medical Center foundation. Thus, the Employer's allowing access was inconsistent with its own no solicitation policy.

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<sup>22</sup> Id.

<sup>23</sup> Id. at 802, fn. 3.

<sup>24</sup> Id.

<sup>25</sup> Be-Lo Stores, supra at 11.

<sup>26</sup> Id. at 10.

<sup>27</sup> Id.

Under these circumstances, we conclude the Employer discriminatorily precluded union activity while sanctioning other solicitation. Accordingly, complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) by denying the Union access to its property.

B.J.K.